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KEJURUTERAAN BINTAI KINDENKO SDN BHD v. FONG SOON LEONG

COURT OF APPEAL, PUTRAJAYA
MOHAMAD ZABIDIN DIAH JCA
VAZEER ALAM MYDIN MEERA JCA
B DARRYL GOON SIEW CHYE JCA
[CIVIL APPEAL NO: B-03(IM)(NCC)-44-05-2019]
20 JANUARY 2021

C ***BANKRUPTCY:*** *Proceedings – Bankruptcy notice and creditor's petition – Setting aside – Appeal against – Court ordered respondent and other petitioners to pay costs to appellant – Whether judgment stated liability of payment of costs joint and several between all petitioners – Whether liability of judgment debtors, if not expressed to be joint and several in judgment or order, was 'joint' with consequence that each judgment debtor is only liable for an equal fraction of judgment debt – Whether*
D *enforcement may only be limited to that aliquot portion*

CIVIL PROCEDURE: *Costs – Liability of payment – Joint and several liability – Court ordered respondent and other petitioners to pay costs to appellant – Whether judgment stated liability of payment of costs joint and several between all petitioners – Whether liability of judgment debtors, if not expressed to be joint and several in*
E *judgment or order, was 'joint' with consequence that each judgment debtor only liable for an equal fraction of judgment debt – Whether enforcement may only be limited to that aliquot portion*

CIVIL PROCEDURE: *Judicial precedent – Stare decisis – Whether court may depart from ratio decidendi of its earlier decisions – Whether exceptions arose*
F

The respondent, along with four other petitioners, had presented petition 26 upon allegations of oppression pursuant to s. 181 of the former Companies Act 1965, against the appellant and 13 others. Consequently, petition 26 was dismissed by the court with an order, *inter alia*, that the respondent and the
G other petitioners pay costs of RM50,000 to the appellant. However, the costs of RM50,000 awarded in the appellant's favour was never paid. As such, the appellant commenced bankruptcy proceedings against the respondent whereby both the bankruptcy notice ('BN') and the creditor's petition ('CP') were based on petition 26. The respondent, on the other hand, responded by
H applying to set aside both the bankruptcy notice and the creditor's petition. The respondent's application was first dismissed by the Senior Assistant Registrar. The respondent then appealed against the decision of the Senior Assistant Registrar to the Judge in Chambers. It was contended by the respondent that the amount the respondent was indebted to was not RM50,000 as stated in the bankruptcy notice and the creditor's petition. The
I respondent's appeal was allowed. In consequence, the bankruptcy notice and creditor's petition were set aside. Dissatisfied, the appellant appealed. In this appeal, the respondent submitted that the order for costs of RM50,000 made

against him and the other petitioners in petition 26 did not state whether their liability for that sum was joint and several. Accordingly, the respondent contended, their liability for the costs awarded was 'joint' and this meant that the five petitioners in petition 26 (including the respondent) were each only liable to an equal portion of the RM50,000 awarded *ie* RM10,000. It therefore followed, according to the respondent, that not only was the amount of the debt stated in the bankruptcy notice and creditor's petition wrong, being much more than the respondent was legally obliged to pay, RM10,000 was also below the statutory limit required to be met before bankruptcy proceedings may be brought. The then applicable statutory limit was RM30,000 under the Bankruptcy Act 1967. In respect of the foregoing contentions, reliance was placed on the decision of the court in *Sumathy Subramaniam v Subramaniam Gunasegaran and Another Appeal* ('*Sumathy*'). The issue that arose was whether the liability of the judgment debtors, if not expressed to be joint and several in a judgment order, was 'joint' with a consequence that each judgment debtor was only liable for an equal fraction of the judgment debt.

Held (dismissing appeal):

(1) It is in principle incorrect to determine whether liability under a judgment is joint or joint and several by reference to the basis or cause of action upon which liability was based. The cause of action, whether founded upon a joint and several guarantee or otherwise, could not be a basis to determine the extent or nature of the liability pronounced in a final judgment. Words should not be added to a judgment where they do not exist unless necessary or legally justified so as to give effect to the intention of the judgment. It would also follow that the word 'jointly' should not be read into a judgment where it is absent, especially if it would have the effect of qualifying the judgment to delimit its effect such that each of the judgment debtor is liable only to a portion of the judgment debt. Indeed, a judgment that imposes merely a joint liability can result in the unintentional release of a co-judgment debtor. This court was thus inclined to conclude that a judgment entered for payment of a sum of money against several judgment debtors imposed upon them and each of them, a joint and several liability to honour the entire judgment debt, and not merely an equal portion of it, unless otherwise stated. It was, however, unfortunate that the conclusion that had been arrived at here was at variance with the decision in *Sumathy*. (paras 53, 55 & 56)

(2) In both *Sumathy* and *Lembaga Kumpulan Wang Simpanan Pekerja v. Edwin Cassian Nagappan* ('*Edwin*'), this court had concluded that a judgment entered against two or more judgment debtors, without more, creates a joint liability such that each of the joint debtors is only liable for an aliquot portion of the judgment sum and therefore, enforcement

may only be limited to that aliquot portion. The basis for the court's decision in both these cases is unambiguous. The Court of Appeal may not depart from its earlier decision unless one of the exceptions identified in *Young v. Bristol Aeroplane* existed. Having considered the matter with care, none of the exceptions existed in this case such that this court may depart from the *ratio decidendi* of the decision in *Sumathy* and *Edwin*. (paras 58, 66 & 70)

(3) The doctrine of *stare decisis* had existed for a considerable period of time. It is among the pillars of the common law system. It facilitates engendering certainty in the law which is a matter of obvious importance. It would not do for there to be a plethora of conflicting decisions from the courts on any particular issue of law. While judges may no doubt sincerely have differences in views, there is also public interest to consider. It would be a lamentable state of the law if members of the public, in whatever sector, are unable to secure legal advice of sufficient certainty in order to properly conduct or regulate their affairs because of a confusing melee of conflicting legal decisions by the courts. But for the doctrine of *stare decisis*, this court would have allowed this appeal. (paras 72 & 73)

Case(s) referred to:

Alliance Bank Malaysia Bhd v. Mukhriz Mahathir & Anor [2006] 2 CLJ 723 HC ***(refd)***

Australian Competition & Consumer Commission v. The Bio Enviro Plan Pty Ltd [2004] FCA 415 ***(refd)***

Cassell & Co Ltd v. Broome & Anor [1972] 2 WLR 645 ***(refd)***

Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***

Dynasty Rangers Sdn Bhd & Anor v. Perak Meat Industries Sdn Bhd [2002] 6 CLJ 1 HC ***(refd)***

Gulf Business Construction (M) Sdn Bhd v. Israq Holding Sdn Bhd [2010] 8 CLJ 775 CA ***(refd)***

Herukh Thakurdas Jethwani & Anor v. Bank Simpanan Nasional [2021] 2 CLJ 291 HC ***(refd)***

Huddersfield Police Authority v. Watson [1947] KB 842 ***(refd)***

In Re A Debtor [1936] 1 Ch 292 ***(refd)***

In Re Abu Bakar Ismail; Ex Parte Alliance Investment Bank Bhd [2011] 1 LNS 1688 HC ***(refd)***

In Re Dato' Dr Elamaran M Sabapathy; ex p RHB Bank Bhd [2011] 10 CLJ 262 HC ***(refd)***

In Re Low [1895] 1 QB 734 ***(refd)***

Kesatuan Pekerja-pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-pekerja Bank & Anor [2017] 4 CLJ 265 FC ***(refd)***

Lembaga Kumpulan Wang Simpanan Pekerja v. Edwin Cassian Nagappan [2020] 1 LNS 226 CA ***(foll)***

Lim Koon Chow v. Ambank (M) Bhd [2012] 4 CLJ 624 HC ***(refd)***

Mainwaring And Another v. Goldtech Investments Ltd (No. 2) [1999] 1 WLR 745 ***(refd)***

Michel v. Bullen (And Aitcheson And Dashwood, Deceased) (1818) 146 ER 749 ***(refd)***

Miller v. Mynn And Others (1859) 120 ER 1213 ***(refd)***

Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Datuk Tan Cheng Swee & Anor [1980] 1 LNS 58 FC ***(refd)***
Re Balasubramaniam; Ex Parte Annamalai [1957] 3 MC 128 ***(refd)***
Royal v. El Ali (No. 3) [2016] FCA 1573 ***(refd)***
Sangar and Others v. Gardiner and Others CP Cooper 497 ***(refd)***
Sumathy Subramaniam v. Subramaniam Gunasegaran & Another Appeal [2018] 2 CLJ 305 CA ***(foll)***
Trade Practices Commission v. Nicholas Enterprises Pty Ltd And Others [1979] FCA 201 ***(refd)***
Yeo Ah Wang v. United Malayan Banking Corporation Bhd [1995] 1 AMR 38 ***(refd)***
Young v. Bristol Aeroplane Co Ltd [1944] KB 718 ***(refd)***

Legislation referred to:
Companies Act 1965 (repealed), s. 181
Employees Provident Fund Act 1991, s. 46

For the appellant - Jasvinjit Singh; M/s Au & Jasvinjit
For the respondent - Sng Eu Kim & Lee Tat Yew; M/s Sulaiman & Taye

[Editor's note: Appeal from High Court, Shah Alam; Bankruptcy No: BA-29NCC-3373-04-2016 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Darryl Goon Siew Chye JCA:

[1] There was one core issue that arose in this appeal. It was, in our view, an important issue and one that has significant consequences particularly in the enforcement of judgment debts.

[2] The issue was this: whether the liability of judgment debtors, if not expressed to be joint and several in a judgment or order, is "joint" with a consequence that each judgment debtor is only liable for an equal fraction of the judgment debt.

[3] This is the judgment of the court.

Background

[4] The factual matrix from which this issue arose was uncomplicated.

[5] Five individuals had presented Petition Pemula No.: D-NCC-26-21/2009 ("petition 26") against 14 respondents.

[6] The respondent was one among the five petitioners in petition 26 while the appellant was one of the 14 respondents.

[7] Petition 26 was presented upon allegations of oppression pursuant to s. 181 of the former Companies Act 1965. It was heard and it failed. Consequently, on 28 July 2010, petition 26 was dismissed with judgment entered in favour of the respondents coupled with an order for costs in their favour; the operative part of which read as follows:

Penghakiman

... Maka Adalah Diperintahkan bahawa Petisyen disini ditolak dengan kos sebanyak RM50,000.00 kepada setiap set Responden yang diwakili oleh peguamcara yang sama.

Thus, petition 26 was dismissed with costs of RM50,000 awarded to each set of respondents represented by the same solicitors.

[8] On the basis of having the same solicitors, there were five sets of respondents in petition 26. The appellant, who had its own solicitor, was one of the five sets of respondents entitled to costs of RM50,000 as against the five petitioners.

[9] The costs of RM50,000 awarded in the appellant's favour was never paid. As such, and after a relatively considerable period of time, the appellant commenced bankruptcy proceedings against the respondent.

[10] The bankruptcy notice dated 13 April 2016 was based on the judgment in petition 26 and the order for costs made. The amount demanded of the respondent was RM50,000.

[11] The creditor's petition, Bankruptcy No.: BA-29NCC-3373-04/2016 dated 19 July 2017, was also based on the judgment in petition 26 of 28 July 2010 and the sum of RM50,000 ordered as costs.

[12] The respondent on the other hand, responded by applying to set aside both the bankruptcy notice and the creditor's petition.

[13] The respondent's application was first dismissed by the learned Senior Assistant Registrar. The respondent then appealed against the decision of the learned Senior Assistant Registrar to the judge in chambers.

[14] Two contentions were put forward by the respondent. The first was that the creditor's petition was filed beyond the time limited to do so. The second was that the amount the respondent was indebted to was not RM50,000 as stated in the bankruptcy notice and the creditor's petition.

[15] The respondent's appeal was allowed by the learned judge on 24 April 2019. In consequence, the bankruptcy notice and creditor's petition were set aside. Being dissatisfied with the decision of the learned judge, the appellant appealed.

[16] The learned judge did not agree with the respondent's first contention but found in his favour in respect of his second. Hence it was the second of the respondent's contention that became the single issue canvassed in this appeal.

The Core Contention

[17] It was the respondent's contention that the order for costs of RM50,000 made against him and the other petitioners in petition 26 did not state whether their liability for that sum was joint and several.

[18] Accordingly, the respondent contended, their liability for the costs awarded was "joint" and this meant that the five petitioners in petition 26 (including the respondent) were each only liable to an equal portion of the RM50,000 awarded ie, RM10,000.

[19] It therefore follows, according to the respondent, that not only was the amount of the debt stated in the bankruptcy notice and creditor's petition wrong, being much more than the respondent was legally obliged to pay, RM10,000 was also below the statutory limit required to be met before bankruptcy proceedings may be brought. The then applicable statutory limit was RM30,000 under the Bankruptcy Act of 1967, then in force.

[20] In respect of the foregoing contentions, reliance was placed on the decision of this court in *Sumathy Subramaniam v. Subramaniam Gunasegaran & Another Appeal* [2018] 2 CLJ 305; [2017] 6 MLJ 753.

[21] The appellant first adopted a head-on attack on the decision in *Sumathy Subramaniam*, contending that it was in error on this very issue raised. As an alternative, it was contended that the decision in *Sumathy Subramaniam* could be distinguished, as the subject matter in that case was not concerned with an order for costs.

Case Law

[22] Over a hundred and eighty years ago in the case of *Sangar and Others v. Gardiner and Others* CP Cooper 497, it was reported that an "order against two persons jointly to pay costs; the process for giving it effect may be joint or several." In that case, somewhat similar to the case at hand, the petition presented by two petitioners were dismissed with costs. The taxed costs were not paid and a motion was made for an order that one of the two against whom the order for costs was made, do pay the taxed costs failing which he be committed. In resisting the motion, the following argument was made:

> ... it was objected, that the order of the Vice-Chancellor dismissing the petition of the Plaintiff Sangar and the said Thomas Cooper with costs, to be taxed by the Master, did not justify the course, which it appeared that Mr. Brooks was pursuing, *of prosecuting Thomas Cooper alone for such costs: that at law, if judgment is recovered against two persons, execution must also be taken out against them both, although the whole amount may be levied upon one.* So in equity, the original order being against two persons, *the whole of the subsequent process ought to be against both of them*, with the exception of the final order to commit, which might be against both or either.
>
> (emphasis added)

This contention was rejected and it was reported as follows:

> The Master Of The Rolls [Lord Langdale] was of opinion that Mr. Brooks had the option of taking out process against the Plaintiff Sangar and the said Thomas jointly, **or against either of them separately**;
>
> (emphasis added)

[23] In *Re Balasubramaniam; Ex Parte Annamalai* [1957] 3 MC 128, an application was made by a judgment debtor to set aside a bankruptcy notice on the ground that there was another judgment debtor and execution proceedings were pending against that judgment debtor. Relying on the decision *In Re Low* [1895] 1 QB 734, Sutherland J, in dismissing the application, held as follows:

> *In re Low* is authority for the proposition that **where judgment has been recovered against several persons, a bankruptcy notice may be issued against one of the joint judgment debtors without including the others**. I could find evidence that the judgment creditor in this case agreed to forego any of his rights against the applicant.
>
> I accordingly dismissed the application to set aside the bankruptcy notice with costs.
>
> (emphasis added)

There was no suggestion in Sutherland J's judgment that the judgment sum had to be divided equally between the judgment debtors for purposes of the bankruptcy notice or execution. Indeed, Sutherland J referred to the minutes of proceedings in the Sessions Court and this disclosed the following entry:

> In my view judgment debtor's application to set aside the bankruptcy notice was misconceived. **Each of the defendants is liable on the judgment**. The fact that execution proceedings may have been taken against the co-judgment debtor, so far as the judgment may not have been satisfied, is irrelevant in relation to proceedings taken by the judgment creditor against this judgment debtor.
>
> (emphasis added)

Both the High Court and the Sessions Court were of like view that enforcement proceedings may be taken against each of the judgment debtors independently in respect of the judgment debt. There was no requirement that the judgment debt be divided equally such that each was only liable for an equal portion.

[24] *In Re Low; Ex parte Gibson* [1895] 1 QB 734; a judgment was recovered against the debtor and three of his co-defendants. A bankruptcy notice was served on the debtor alone stating *inter alia* the entire amount the judgment was entered for. The bankruptcy notice had erroneously stated six names against whom that judgment was entered instead of four, ie, the debtor and three of his co-defendants. This error was held to be curable as the judgment debtor was not misled. The other point raised, which is relevant for our present purposes, was expressed and dealt with somewhat dismissively by Lord Esher MR as follows:

> **It is said that where the judgment is a joint one against several defendants, a bankruptcy notice cannot be effective except it is drawn up against all the defendants**, although it need only be served on the one whom it is desired to make bankrupt. I fail to see what good it can do

> that one to have names of the others put in the notice when there is absolutely no necessity for serving it on them. **This is a technicality to which we ought not to listen**.
>
> (emphasis added)

This case is authority that one need not cite all the names of co-judgment debtors in a bankruptcy notice. It is also authority that bankruptcy proceedings may be brought only as against one of several judgment debtors for the judgment sum. The bankruptcy notice issued against the debtor was for the amount awarded against the four defendants. There was no suggestion that the amount that the judgment creditor was entitled to enforce against the single judgment debtor was only a portion of the judgment sum divided equally among the four judgment debtors.

[25] In fact, in the earlier decision of *Michel v. Bullen (and Aitcheson and Dashwood, Deceased)* (1818) 146 ER 749, it was held that, "Where one of several co-defendants in a suit for tithes, wherein a general decree of costs had been made, survived the rest, the court refused to order the costs to be apportioned, so as to relieve the survivor from the effect of such decree." It was argued that, "... the defendant Bullen ought not be considered liable to the payment of the costs of the other defendants, who were dead, as the interest of the several defendants were distinct, and the trials had been distinct". Richards, Lord Chief Baron's response to this argument was as follows:

> *I never remember any instance of a case where the decree for costs had been general, in which a defendant who has survived his co-defendants has been relieved on such an application as the present*. It may possibly be a hard thing on the surviving defendant, but it is one of the hardships which necessarily belong to such a case. No instance whatever is adduced of such a thing ever having been done, and I think it contrary to every rule of a court of equity. As to the first part of the motion it may be referred back to the Deputy Remembrance to review his taxation, but the latter part must be refused.
>
> (emphasis added)

There was thus no question of delimiting or apportioning the liability of a judgment debtor awarded in that case against several defendants under a decree. All the judgment debtors were and remained liable for the whole of the judgment debt.

[26] In *Miller v. Mynn And Others* (1859) 120 ER 1213, the plaintiff obtained judgment against three defendants "jointly". It had been ordered that debts owing or accruing from a garnishee to two of the three judgment debtors be attached to answer the judgment debt. The question that arose was, "... whether, on this judgment, a debt, other than a debt due to all the three judgment debtors jointly ..." can be attached under the then applicable Common Law Procedure Act of 1854. The court held that it can. Erle J was of the view that "The judgment against three binds the three, **jointly and severally**; ..." (emphasis added), a view that Crompton J also agreed with.

[27] *In Re A Debtor* [1936] 1 Ch 292, a judgment debt was recovered against a firm. A bankruptcy notice was served against only one of its partners. The question arose as to whether a receiving order may be made against that individual partner. Lord Wright MR in the Court of Appeal affirming the decision of the divisional court, explained as follows:

> It is perfectly true that in form the judgment was against a firm of Robert Jackson & Co. of which the debtor was a partner, but nonetheless it is a judgment against the debtor in his capacity of a partner. He is jointly and severally responsible for all the debts of the firm; and each debt including this judgment debt, may be enforced against him individually, and, therefore, is a final judgment against him even though it is also a judgment against someone else.

In the course of his judgment, Lord Wright MR went on to observe as follows:

> A more difficult position, however, would arise if the other debtor on whom the petition was not served had secured the sum to the creditors' satisfaction or to the satisfaction of the Court. That difficulty I think could be met only by saying that in that case the debtor on whom the notice was served would be entitled to rely on what had been done by his co-debtor. **Each is a debtor and each is severally liable for the debt: but each is entitled to rely on what his co-debtor has done**.
>
> (emphasis added)

The effect of the judgment entered, described by Lord Wright MR, could however be explicable by implication upon the fact that the judgment was entered against the firm, as a firm. This would import legal consequences associated with partnerships.

[28] In *Yeo Ah Wang v. United Malayan Banking Corporation Bhd* [1995] 1 AMR 38, the validity of a bankruptcy notice was challenged on the ground that it was based on a judgment against three defendants but was issued only against one of the three defendants. Shaik Daud J (as His Lordship then was) allowed the appeal against the decision of the Senior Assistant Registrar and set aside the bankruptcy notice. In so doing, His Lordship held that judgment was obtained against all three defendants and they were jointly liable to repay the sum due to the plaintiff. His Lordship also stated that the plaintiff could not deviate from the judgment to impose the burden of bearing the responsibility of all three defendants on one of them. His Lordship stated of the judgment in question as follows:

> Penghakiman tersebut memerintahkan ketiga-tiga defendan sesama membayar kepada plaintiff sejumlah wang.

It is not clear whether such was expressed in the judgment or whether it was silent and His Lordship was merely describing the effect of the judgment. It is perhaps noteworthy that no authority was cited for His Lordship's conclusion. In fact, no authority was cited at all.

[29] In *Mainwaring And Another v. Goldtech Investments Ltd (No. 2)* [1999] 1 WLR 745, two parties became liable for costs in respect of two actions that were consolidated. There was a procedural dispute based on the rules applicable which is of no particular concern for the purpose of the case at hand. The result in that case was that the whole taxation proceedings against one of the judgment debtor was struck out. What is pertinent was not a point argued and determined by the court but one that was regarded as common ground and upon which there was no dispute. In the judgment of the Court of Appeal, Pill LJ stated:

> It is common ground that, upon the making of the orders for costs by Hoffmann J., Ms Mainwaring and Mr. Lisle **became jointly and severally liable** ...
>
> ...
>
> **It is common ground that the orders for costs made by Hoffmann J. created in Ms Mainwaring and Mr Lisle a joint and several liability**. By virtue of the common law rule, one person under a joint liability for debt is released by the discharge of the other: *In re E.W.A (A Debtor)* [1901] 2 K.B. 642. The common law rule was upheld, not without reluctance, in this court in *Watts v. Aldington*, The Times, 16 December 1993; ... It is subject to the exception that the creditor may agree with a joint debtor to release him but reserve in the agreement his rights against the other tortfeasor, *In re E.W.A.*, at p. 649 and *Watts v. Aldington*, per Steyn L.J.
>
> (emphasis added)

The foregoing case is referred to merely for the indication that it is generally accepted that judgment debtors under a judgment are jointly and severally liable.

[30] In *Dynasty Rangers Sdn Bhd & Anor v. Perak Meat Industries Sdn Bhd* [2002] 6 CLJ 1; [2002] 5 MLJ 291, a winding-up petition was presented against the respondent company. The petition was opposed on the ground that the debt upon which the petition was based arose from an award in an arbitration that was made against the respondent and one other. It was contended that as such, the petitioner could not proceed only against the respondent. Kang Hwee Gee J considered both *Yeo Ah Wang* and *In Re Balasubramaniam*, and preferred the view expressed in the latter. In his judgment, Kang Hwee Gee explained as follows:

> Much confusion has arisen in the matter because of the difficulty in understanding the effect of a joint liability which two or more losing defendants have to bear *vis-a-vis* the right of the winning plaintiff to enforce the judgment debt.
>
> *One must appreciate that when a judgment debtor is under a joint liability with another to pay a debt, either of them may have to bear the whole of that liability all by himself to the creditor up to the limit of the judgment sum. From the standpoint of the judgment creditor, that liability is several in the sense that he is at liberty to*

> *choose on whom to enforce the judgment sum whether only on one judgment debtor individually or on both collectively*. That principle had never been in dispute and had in fact been confirmed in the judgment of Lord Esher MR in *Re Low*.
>
> ...
>
> The petitioner is at liberty to issue the notice whether against both the judgment debtors on a joint basis, or as it has done in this instance, only against the respondent without prejudice to its rights to issue another on the other judgment debtor.
>
> (emphasis added)

How His Lordship had described the liability of joint judgment debtors was in effect that they are jointly and severally liable to pay the judgment sum the whole judgment sum and not any part thereof to be divided among the judgment debtors.

[31] The issue came up again, but only *en passant*, in a decision of this court in *Gulf Business Construction (M) Sdn Bhd v. Israq Holding Sdn Bhd* [2010] 8 CLJ 775; [2010] 5 MLJ 34. In that case, although the order in question directed the respondents to "jointly and severally" repay the petitioner trust monies with interest accrued thereon, Abdul Malik Ishak JCA, at p. 781 (CLJ); p. 39 (MLJ), nevertheless observed as follows:

> [5] Now, even if the court order was not made jointly and severally against both the respondent and Tetuan Par Govind & Co, yet either one of them would still have to bear the whole of that liability all by itself up to the limit of the judgment on the strength of the authority of the case *Dynasty Rangers Sdn Bhd & Anor v. Perak Meat Industries Sdn Bhd* [2002] 6 CLJ 1.

This observation made by Abdul Malik Ishak JCA was clearly *obiter dictum* and with no binding effect.

[32] In *In Re Dato' Dr Elamaran M Sabapathy; ex p RHB Bank Bhd* [2011] 10 CLJ 262 was another case where a judgment debtor sought to set aside both, a bankruptcy notice and a creditor's petition issued against him. A potpourri of contentions was advanced. Among them was a contention identical to the argument raised in the present case; that the sum owed was not that which was set out in the bankruptcy notice and creditor's petition. It was contended that the judgment in question was entered against three defendants and the judgment was not expressed to be "joint and several". Therefore, it was argued, each judgment debtor was only liable for a third of the judgment debt and accordingly the bankruptcy notice and the creditor's petition stating the judgment debtor's liability to be for the whole of the judgment debt was wrong. On this point raised, Varghese George JC (as His Lordship then was), held as follows:

> [7.1]... There is nothing in the said judgment to show that the three defendants named there (one of whom was the JD) was adjudged to be jointly and severally liable to pay the judgment sum to the JC (the plaintiff there).
>
> *In the absence of the judgment spelling out expressly that the defendants were jointly and severally liable to the plaintiff, the judgment there has, as in the ordinary course, to be a judgment imposing joint liability or obligation on the three defendants to meet the judgment sum together*. In such event the *JD's obligation is only one-third the amount of the judgment sum* and not as set out in the bankruptcy notice, or for the matter in the creditor's petition.
>
> (emphasis added)

The authority referred to by His Lordship for his conclusion was the decision in the case of *Yeo Ah Wang* referred to above.

[33] *Lim Koon Chow v. Ambank (M) Bhd* [2012] 4 CLJ 624; [2012] 8 MLJ 285, was yet another case in which a challenge was mounted against the validity of a bankruptcy notice and the creditor's petition upon *inter alia* the ground that the judgment debt was recovered against three defendants and the applicant being one of them was only liable for a third of the judgment debt recovered. In rejecting this contention by the applicant judgment debtor, His Lordship Lee Swee Seng JC (as he then was) stated:

> [105] **As for me I cannot see how a judgment entered against all three defendants** (D1 Computsoft Sdn Bhd, D2 Lim Koon Chow and D4 Lim Kim Chow) **cannot be enforced against anyone (*sic*) one or more or all of them** for the words of the judgment when translated into English read:
>
> > IT IS THIS DAY ADJUDGED that the First Defendant, the Second Defendant and the Fourth Defendant do pay the Plaintiff:
> >
> > (i) The sum of RM21,615,617.23...
>
> [106] **The JC always has a choice to decide which of the three defendants to proceed against with respect to execution**. So in a case where D1 has been wound-up and D4 is a bankrupt for instance, the JC would proceed to execute the whole judgment against D2.
>
> ...
>
> [108] There is nothing unclear, confusing or vague about the sum to be paid by D1, D2 and D4 and the sum to be paid **cannot be susceptible to an interpretation of a payment to be divided equally among the three defendants**.
>
> (emphasis added)

His Lordship then referred to the case of *Alliance Bank Malaysia Bhd v. Mukhriz Mahathir & Anor* [2006] 2 CLJ 723; [2006] 4 MLJ 451 at pp. 462-463 and concluded as follows:

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> [110] Having read the above decision I am fortified that even without the words 'jointly and severally' in the body of the judgment, there is no ambiguity as to how much the plaintiff as JC can proceed against each one of the JC either alone or together or against all the three of them.

Although *In Re Dato' Dr Elamaran M Sabapathy* was an authority cited on the
B issue in question, it was not followed. His Lordship found opportunity to re-assert his views on this issue *In Re Abu Bakar Ismail; Ex Parte Alliance Investment Bank Bhd* [2011] 1 LNS 1688.

[34] Learned counsel for the appellant in his submissions referred to several decisions of the Australian courts and they too expressed the view
C that judgment debtors are jointly and severally liable.

[35] In a judgment that was concerned with consequential questions of pecuniary penalties, injunctive relief and costs, Fisher J in *Trade Practices Commission v. Nicholas Enterprises Pty Ltd and Others* [1979] FCA 201, was confronted by the following contention which the learned judge described as
D follows:

> The Morphett Arms' contention was that a designated proportion of the plaintiff's costs should be ordered to be paid by each of them, the Morphett Arms and the Royal Oak; in other words **that each be severally liable for a specified portion of the plaintiff's costs as ordered, and not**
E **jointly liable to the plaintiff for the whole of those costs**.
>
> (emphasis added)

The learned judge expressed that there was an initial attraction to what appeared to be the justice of the argument but "Upon more matured consideration" reject the argument on the following grounds.
F

> *The plaintiff as the successful party is prima facie entitled by way of indemnity to its costs of the action, and if one of the unsuccessful defendants is unable or unwilling to meet its share of the obligation, the misfortune should be that of its "partner in crime" and not of the plaintiff.* In so far as I have been able to find any authority, it is in favour of the contrary proposition to that propounded
G by counsel on behalf of the Morphett Arms. I refer to *Dansk Rekylriffel Syndikat Aktieselskah v. Snell* [1908] 2 Ch 127 at 138, where an order was made against defendants jointly in circumstances where one became bankrupt during the proceedings. In my opinion *the conventional order that the two defendants pay the plaintiff's costs should stand.*
>
> (emphasis added)
H

[36] In *Australian Competition & Consumer Commission v. The Bio Enviro Plan Pty Ltd* [2004] FCA 415, several issues were posed and among them was whether a lump sum costs order against all the respondents should be made. In considering the issue, R D Nicholson J, in the Federal Court of Australia,
I Western Australia, stated:

> The usual approach is that **where an order for the payment of costs is made against two or more persons the liability in respect of that order is joint and several as between them** (eg *Ryan v. South Sydney Junior Rugby*

League Club Ltd [1975] 2 NSWLR 660 at 663) and may be enforced against them jointly or against any one of them separately: *Michel v. Bullen* (1818) 146 ER 749; *Sangar v. Gardiner* (1838) 47 ER 497.

(emphasis added)

See also generally *Royal v. El Ali (No. 3)* [2016] FCA 1573 at para 53.

Prior Decisions Of The Court Of Appeal

[37] In *Sumathy a/p Subramaniam*, the court was concerned with two appeals that were in respect of two applications to set aside a bankruptcy notice based on a summary judgment entered against the appellants. The respondent's claim against the appellants was filed in the Sessions Court and was based on a friendly loan given to one of the appellants, Sumathy, which was in turn guaranteed by the other appellant. The ground relied upon by the appellants in their applications was that the sum stated and claimed in the bankruptcy notice was more than what the respondent was entitled to. The appellants' applications were allowed by the Senior Assistant Registrars. The respondent's appeals to the learned judge in chambers were, in turn, allowed. Hence the appeals to the Court of Appeal.

[38] The contentions of the appellants in *Sumathy*, with which the court agreed, were succinctly set out in the judgment of the court by Mary Lim JCA (as Her Ladyship then was) as follows:

> [12] It is the argument of both appellants that while the respondent may be entitled to enter judgment for the same single sum, which the respondent did, the liability of each of them is necessarily joint. This is because the summary judgment that was entered has not specified that both appellants are jointly and severally liable for that single sum. *Where the judgment is silent or has not specified that liability is joint and several, the liability is necessarily joint. Where liability is joint, each of the appellant as defendant, shares that liability equally* – see *Re Dato Elamaran M Sabapathy; Ex P RHB Bank Bhd* [2011] 10 CLJ 262; [2010] MLJU 1424. *And so, when it comes to enforcing the judgment, the respondent has a right to enforce only half the judgment sum against each appellant*. The respondent is not entitled to enforce the full sum against both of them, certainly not at the same time.
>
> (emphasis added)

This was the same argument advanced by the respondent in the current case.

[39] The court in *Sumathy* referred to the decisions in *Re Dato' Dr Elamaran M Sabapathy* and *Yeo Ah Wang* and agreed with the reasoning that, "... a bankruptcy notice must accord with or follow the terms of the judgment or order." The court was also of the view that the cause of action had merged into the judgment and the "enforcement court" cannot be called upon to address and interpret the judgment in terms which are simply not there. That would require the court to "go behind the judgment" which was not the function of the "enforcement court".

[40] Of the judgment in question in *Sumathy*, it was stated thus:

> [2] ... On 4 September 2016, the respondent entered summary judgments against both appellants. The terms of the summary judgment which is the same in respect of both appellants, *inter alia*, are as follows:
>
> > Defendan hendaklah membayar kepada plaintif iaitu Jumlah Penghakiman sebanyak RM291,800, faedah pada kadar 5% setahun dari tarikh 22.11.2014 hingga tarikh Penghakiman, faedah pada kadar 5% setahun dari tarikh Penghakiman sehingga penyelesaian penuh dan kos sebanyak RM4,000.

It would seem from the facts of *Sumathy* as narrated that a separate judgment was entered against each of the appellants and the judgments each referred to a singular defendant for the same judgment debt. Thus, it would appear that each of the judgments entered could literally be read as a judgment entered against a single defendant for a single judgment debt.

[41] In finding for the appellants and in respect of the contentions raised, the court in *Sumathy* held as follows, at pp. 316-317 (CLJ); pp. 763-764 (MLJ) of the report:

> [24] ... *From the terms of the judgment, it cannot be that both appellants are required to pay exactly the same sum. As joint debtors, each can only be required, under the law and as ordered by the court, to pay the sum stipulated, jointly and in equal proportions*.
>
> [25] ... From our reading of *the terms of the summary judgment, it cannot convey the meaning that the respondent claims, that the appellants are jointly and severally responsible for the non-payment of the loan*. The loan agreement in question does not provide for such terms, neither does the respondent's statement of claim including its reliefs and certainly, not in the summary judgment.
>
> [26] From what we can see of *the summary judgment dated 4 September 2015, it is plain that it pronounces both appellants liable and that their liability is joint. We cannot read or infer the appellants' liability to be joint and several as such a reading would go against the plain terms of the judgment*. In any event, there are no express terms in the loan agreement indicating that the parties have agreed that the liability of the borrower and the guarantor is joint and several. It would therefore be contrary to the contractual arrangements reached between the parties if this court were to read that the liability of the appellants is joint and several. As co or joint defendants, the appellants' liability though arising differently, one as the principal borrower, the other as guarantor, is proportionately for the same sum. That proportion must be spelt out when demanding for payment and when presenting a bankruptcy notice.
>
> [27] The appellants cannot be expected to each pay the same sum and then seek correction from the official assignee when seeking a discharge. The existence of the two bankruptcy notices with similar terms and the same amount drives home the appellants' contention that these notices are indeed, invalid. *If both appellants were to pay up the same amount as they*

are required to do under the bankruptcy notices, the respondent would effectively be very much overpaid. Clearly, the sum stipulated in both bankruptcy notices are inaccurate and do not accord with the terms of the summary judgment.

(emphasis added)

[42] Following the decision in *Sumathy*, this court in *Lembaga Kumpulan Wang Simpanan Pekerja v. Edwin Cassian Nagappan* [2020] 1 LNS 226, citing *Sumathy*, held that "joint and several liability" cannot be imported into a consent judgment if those words do not appear. In the words of Vernon Ong Lam Kiat JCA (as His Lordship then was):

[9] In our considered view, **this case falls squarely within the principles enunciated in *Sumathy*** (*supra*). We appreciate the fact that the action against the defendants was filed on the basis that the defendants would be jointly and severally liable for unpaid contributions pursuant to s. 46 of the EPF Act 1991. However, **what the learned counsel for KWSP is asking this court to do is to read the words 'jointly and severally' into the consent judgment when such words are plainly absent**. We do not think that we can do that as the judgment was a consent judgment entered by the parties and the parties must be taken to know the terms and conditions of the same.

...

[11] **As a starting point, we do not think that we can import joint and several liability into the consent judgment notwithstanding s. 46 of the EPF Act 1991**. (emphasis added)

Thus, reliance on the basis that the judgment debtors' liability under s. 46 of the Employees Provident Fund Act 1991 is joint and several, did not persuade the court to imply that liability under the consent judgment was also joint and several. Save for the decision in *Sumathy*, no other authority was relied upon or referred to in *Edwin Cassian Nagappan*.

[43] *Sumathy*'s case, reinforced by the decision in *Edwin Cassian Nagappan*, therefore stands for the proposition that where a judgment or order is entered against several judgment debtors, their liability is joint and the court may not read into the judgment or infer that the liability of the judgment debtors is "joint and several" if those words do not appear in the judgment.

A Different Conclusion

[44] We however have, with respect, arrived at a conclusion different from that in *Sumathy* and *Edwin Cassian Nagappan*.

[45] From the cases referred to, the preponderance of judicial view for over a century has been quite the opposite. Judgment debtors are regarded as jointly and severally liable under a judgment or order, unless stated otherwise.

[46] This view carried with it the consequence that each and every judgment debtor is liable to enforcement not merely for an aliquot part of the judgment debt but for the entire judgment debt or any part thereof.

[47] The cases disclose that it does not matter whether the imposition of the liability to pay was in an order (eg, an order for costs) or a final judgment recovered against debtors for a sum claimed.

[48] The judgment creditor's entitlement to and the judgment debtors' joint and several liability for the judgment debt is, of course, necessarily limited to the amount of the judgment debt. This is simply because that is the amount adjudged to be due in respect of the claim made in the action.

[49] Where an order is made or judgment recovered against two or more parties for payment of a sum of money, without more, it simply means that all the judgment debtors and each of them is liable for the amount adjudged to be due. There is no need to read into such a judgment or order the idea of joint and several liability because in the manner of its pronouncement that is already its effect, unless stated otherwise. In this, we agree with the observation of Lee Swee Seng JC in *Lim Koon Chow v. AmBank (M) Bhd* at para. [109] of His Lordship's judgment, referred to above.

[50] Indeed, what should also not be done is to read into and to qualify such a judgment as only creating a "joint liability" for the sum adjudged or ordered, with the additional consequence that each defendant is only liable for an equal portion of the judgment debt.

[51] If a borrower of a fixed sum of money is adjudged liable to repay that sum, he remains liable for that sum. It cannot be that if there exists a guarantor found to be jointly liable, the principal debtor's debt and liability therefore becomes half the amount if judgment is entered against both the principal debtor and his guarantor. Without having to be expressed, the liability of the principal for the whole amount borrowed remains. The guarantor's liability is also necessarily for the same amount guaranteed. They are both thus jointly liable for the same amount adjudged or ordered. They are also each individually liable for that amount. They are both jointly and severally liable.

[52] This however, does not mean that where there are several judgment debtors, the judgment creditor is entitled to recover more than what was adjudged to be due to him by recovering the same amount from each of the judgment debtor. As indicated above, this is because the amount adjudged to be due remains the one judgment sum and not multiples of it.

[53] In our view, it is in principle incorrect to determine whether liability under a judgment is joint or joint and several by reference to the basis or cause of action upon which liability was based. The cause of action, whether founded upon a joint and several guarantee or otherwise, cannot be a basis

to determine the extent or nature of the liability pronounced in a final judgment. Such was inherently the view in *Edwin Cassian Nagappan*, although the judgment in that case was entered by consent.

[54] From a jurisprudential point of view, as Mary Lim JCA pointed out in *Sumathy*, one cannot go behind the judgment to impose a meaning to the judgment if it is not already in the judgment. The cause of action would have merged into the judgment and what remains is what was finally determined and set out in the judgment. From a practical perspective one cannot expect a bailiff to go behind a judgment to determine if liability arose from, for example, a joint and several guarantee or otherwise and if not, to apportion the judgment sum by the number of judgment debtors and to levy execution only for such portion arrived at against each judgment debtor.

[55] It is clearly so that words should not be added to a judgment where they do not exist unless necessary or legally justified so as to give effect to the intention of the judgment. It would also follow that the word "jointly" should not be read into a judgment where it is absent, especially if it would have the effect of qualifying the judgment to delimit its effect such that each of the judgment debtors is liable only to a portion of the judgment debt. Indeed, a judgment that imposes merely a joint liability can result in the unintentional release of a co-judgment debtor (see *Mainwaring And Another v. Goldtech Investments Ltd (No. 2)* [1999] 1 WLR 745).

[56] Upon the authorities discussed and the consistency of judicial views expressed, we are inclined to conclude that a judgment entered for payment of a sum of money against several judgment debtors imposes upon them and each of them, a joint and several liability to honour the entire judgment debt, and not merely an equal portion of it, unless otherwise stated. It is unfortunate that the conclusion that has been arrived at in this case is at variance with the decision in *Sumathy*.

[57] We would thus have allowed the appeal but for the doctrine of *stare decisis*.

Stare Decisis

[58] In both *Sumathy* and *Edwin Cassian Nagappan*, this court has concluded that a judgment entered against two or more judgment debtors, without more, creates a joint liability such that each of the joint debtors is only liable for an aliquot portion of the judgment sum and therefore enforcement may only be limited to that aliquot portion. The basis for the court's decision in both these cases is unambiguous.

[59] It was suggested by learned counsel for the appellant that the decision in *Gulf Business Construction (M) Sdn Bhd* was a decision of this court that conflicted with the decision in *Sumathy*. That however, cannot be correct.

The view expressed by Abdul Malik Ishak JCA in that case was clearly *obiter dictum*. The fact was, in that case, the judgment did expressly state that liability was both joint and several.

[60] It was also suggested that *Sumathy* may be distinguished as it was not a case concerning an order for costs as is the case at hand. Such a distinction would be artificial and contrived. The proposition enunciated in *Sumathy* was not qualified in any manner that would admit of such a differentiation.

[61] In our view, with respect, the basis upon which the High Court in *Herukh Thakurdas Jethwani & Anor v. Bank Simpanan Nasional* [2021] 2 CLJ 291; [2020] MLJU 1723 in para. [20], sought to distinguish *Sumathy* and *Edwin Cassian Nagappan* was untenable. The principle upon which *Sumathy* was decided was clearly not dependent on whether it was a consent judgment (which was not the case in *Sumathy*) or based on any expression in the judgment that liability thereunder was joint.

[62] The question therefore arises as to whether this court may depart from its earlier decisions in *Sumathy* and *Edwin Cassian*.

[63] In *Young v. Bristol Aeroplane Co Ltd* [1944] KB 718, at pp. 725-726, Lord Greene MR stated:

> In considering the question whether or not this court is bound by its previous decisions and those of courts of coordinate jurisdiction, it is necessary to distinguish four classes of case. **The first** is that with which we are now concerned, namely, cases where this court finds itself confronted with one or more decisions of its own or of a court of coordinate jurisdiction which cover the question before it and there is no conflicting decision of this court or of a court of coordinate jurisdiction. **The second** is where there is such a conflicting decision. **The third** is where this court comes to the conclusion that a previous decision, although not expressly overruled, cannot stand with a subsequent decision of the House of Lords. **The fourth** (a special case) is where this court comes to the conclusion that a previous decision was given *per incuriam*. In the second and third classes of case it is beyond question that the previous decision is open to examination. In the second class, the court is unquestionably entitled to choose between the two conflicting decisions. In the third class of case the court is merely giving effect to what it considers to have been a decision of the House of Lords by which it is bound.
>
> (emphasis added)

[64] In delivering the judgment of the Federal Court in *Parlan Dadeh v. PP* [2009] 1 CLJ 717; [2008] 6 MLJ 19 at p. 731 (CLJ); p. 32 (MLJ), Augustine Paul FCJ stated pointedly:

> [15] It is therefore beyond doubt that the Court of Appeal is bound by its previous decisions subject to the exceptions enumerated in the passage above.

[65] The "passage above" referred to by His Lordship Augustine Paul FCJ was a passage from the judgment of Peh Swee Chin FCJ in the earlier decision of the Federal Court in *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645; [1998] 1 MLJ 1 at p. 660 (CLJ); pp. 12-13 (MLJ), where Peh Swee Chin FCJ stated:

> The doctrine of *stare decisis* or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decisions of the courts at a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal.
>
> The said exceptions are as decided in *Young v. Bristol Aeroplane Co Ltd* [1944] KB 718. The part of the decision in *Young v. Bristol Aeroplane* in regard to the said exceptions to the rule of judicial precedent ought to be accepted by us as part of the common law applicable by virtue of Civil Law Act 1956 *vide* its s. 3.
>
> *To recap, the relevant ratio decidendi in Young v. Bristol Aeroplane is that there are three exceptions to the general rule that the Court of Appeal is bound by its own decisions* or by decision of courts of coordinate jurisdiction such as the Court of Exchequer Chamber. The three exceptions are first, a decision of Court of Appeal given *per incuriam* need not be followed; secondly, when faced with a conflict of past decisions of Court of Appeal, or a court of coordinate jurisdiction, it may choose which to follow irrespective of whether either of the conflicting decisions is an earlier case or a later one; thirdly it ought not to follow its own previous decision when it is expressly or by necessary implication, overruled by the House of Lords, or it cannot stand with a decision of the House of Lords. There are of course further possible exceptions in addition to the three exceptions in *Young v. Bristol Aeroplane* when there may be cases the circumstances of which cry out for such new exceptions so long as they are not inconsistent with the three exceptions in *Young v. Bristol Aeroplane.*
>
> A few words need be said about a decision of Court of Appeal made *per incuriam* as mentioned above. *The words 'per incuriam' are to be interpreted narrowly to mean as per Sir Raymond Evershed MR in Morelle v. Wakeling [1955] 2 QB 379 at p 406 as a 'decision given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding in the court concerned so that in such cases, some part of the decision or some step in the reasoning on which it is based, is found on that account to be demonstrably wrong*'. It should be borne in mind that the year of *Morelle*'s case is 1955 whereas our s. 3 of the Civil Law Act was enacted in 1956. The *ratio* in *Morelle*'s case is also part of the common law applicable to us.
>
> In our local context, the Federal Court is to be substituted for the House of Lords with regard to the matter under discussion. (emphasis added)

See also the decision of the Federal Court to similar effect in *Kesatuan Pekerja-pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-pekerja Bank & Anor* [2017] 4 CLJ 265; [2018] 2 MLJ 590.

[66] Therefore, the Court of Appeal may not depart from its earlier decision unless one of the exceptions identified by Lord Greene MR in *Young v. Bristol Aeroplane* exists. This is unlike the situation in respect of decisions of the High Court where the general rule is that a judge at first instance will abide by the decision of another of the High Court at first instance as a matter of judicial comity unless he is convinced that the prior decision was wrong (see for example *Huddersfield Police Authority v. Watson* [1947] KB 842 at p 848).

[67] As stated above, *Gulf Business Construction (M) Sdn Bhd* was not an inconsistent decision of this court upon its *ratio decidendi* such that could bring into play Lord Greene MR's second exception in *Young v. Bristol Aeroplane*.

[68] It needs also to be pointed out that holding a prior decision of the court to have been made *per incuriam* is not something to be done lightly. Based on the authorities, a judgment may only be said to be *per incuriam* if it was arrived at either in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court.

[69] The relevant case law was set out as follows in the judgment of the Federal Court in *Kesatuan Pekerja-Perkerja Bukan Eksekutif Maybank Bhd* by Balia Yusof JCA (as His Lordship then was) sitting as judge of the Federal Court:

> [28] The Latin term'*per incuriam*' means through want of care, through inadvertence or by mistake. A decision given *per incuriam* is given 'in ignorance or forgetfulness' of an earlier relevant case or an inconsistent legislative provision. *Osborn's Concise Law Dictionary* (8th Ed) says a decision of the court is not a binding precedent if given *per incuriam* ie without the court's attention having been drawn to the relevant authority, or statute.
>
> [29] Lord Goddard CJ in delivering the judgment of the Court of Appeal in *Huddersfield Police Authority v. Watson* [1947] 2 All ER 193 said at p 196 as follows:
>
> > What is meant by giving a decision *per incuriam* is giving a decision when a case or a statute has not been brought to the attention of the court and they have given the decision in ignorance or forgetfulness of the existence of that case or that statute.
>
> [30] In *Morelle Ltd v. Wakeling* [1955] 1 All ER 708, Sir Raymond Evershed MR speaking on the same subject matter had in his judgment in the Court of Appeal said the following at p. 718:
>
> > As a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in *ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned*: so that in such cases some part of the decision or some step in the reasoning on which is based is found, on that account, to be demonstrably wrong. *This definition*

> *is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam must, in our judgment, consistently with the stare decisis rule which is an essential feature of our law, be, in the language of Lord Greene MR, of the rarest occurrence*.

[31] On the application of the doctrine, it is instructive to refer to the words of Sir John Donaldson MR in *Duke v. Reliance Systems Ltd* [1987] 2 WLR 1225 when he said at p. 1228:

> I have always understood that the *doctrine of per incuriam only applies where another division of this court has reached a decision in the absence of knowledge of a decision binding upon it or a statute, and that in either case, it has to be shown that, had the court had this material, it must have reached a contrary decision*. That is *per incuriam*, *I do not understand the doctrine to extend to a case where, if different arguments had been placed before it or if different material had been placed before, it might have reached a different conclusion*. That appears to me to be the position at which we have arrived today.

[32] The above quote was approved by our then Supreme Court in *Government of Malaysia v. Lim Kit Siang; United Engineers (M) Berhad v. Lim Kit Siang* [1988] 2 MLJ 12 and by the Federal Court in *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673.

(emphasis added)

[70] Having considered the matter with care, we find that none of the exceptions exists in this case such that we may depart from the *ratio decidendi* of the decision in *Sumathy* and *Edwin Cassian Nagappan*.

[71] We have eschewed embracing any contrivance or artifice so as to justify departing from the decisions in *Sumathy* and *Edwin Cassian Nagappan*. The doctrine of *stare decisis* exists and it exists for good reason. As Chang Min Tat FJ observed in *PP v. Datuk Tan Cheng Swee & Anor* [1980] 1 LNS 58; [1980] 2 MLJ 276, p. 278, after referring to the observation of Lord Hailsham of St Marylebourne LC in *Cassell & Co Ltd v. Broome & Anor* [1972] 2 WLR 645 at p 653:

> Clearly the principle of *stare decisis* requires more than lip-service

[72] The doctrine of *stare decisis* has existed for a considerable period of time. It is among the pillars of the common law system. It facilitates engendering certainty in the law which is a matter of obvious importance. It would not do for there to be a plethora of conflicting decisions from the courts on any particular issue of law. While judges may no doubt sincerely have differences in views, there is also public interest to consider. It would be a lamentable state of the law if members of the public, in whatever sector, are unable to secure legal advice of sufficient certainty in order to properly conduct or regulate their affairs because of a confusing melee of conflicting legal decisions by the courts.

[73] But for the doctrine of *stare decisis*, we would have allowed this appeal. Perhaps the apex court might in the future regard it fit and proper for it to consider the decision in *Sumathy*, should the opportunity arise.

[74] For the reasons given above, the appeal was dismissed. Having regard to the circumstances, no order as to costs was made.